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No. 552

In the Supreme Court of the United States

OCTOBER TERM, 1960

ESTATE OF EDWARD A. CUNHA, DECEASED, BANK OF AMERICA, NATIONAL TRUST AND SAVINGS ASSOCIATION, EXECUTOR, PETITIONER

v.

COMMISSIONER OF INTERNAL REVENUE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

J. LEE RANKIN,
Solicitor General,
CHARLES K. RICE,
Assistant Attorney General,
ROBERT N. ANDERSON,
L. W. POST,
Attorneys,
Department of Justice, Washington 25, D.C.

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OPINIONS BELOW

The opinion of the Tax Court (R. 24–33) is reported at 30 T.C. 812. The opinion of the Court of Appeals (R. 43–51; Pet. 1a–10a) is reported at 279 F. 2d 292.

JURISDICTION

The judgment of the Court of Appeals was entered on May 23, 1960. (R. 52; Pet. 11a.) A petition for rehearing was denied on August 31, 1960. (R. 53; Pet. 2.) The petition for a writ of certiorari was filed on November 28, 1960. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the courts below correctly sustained the Commissioner's determination that 60 per cent of the amount paid to a widow for her support during the settlement of her husband's estate is not deductible as a part of the marital deduction under Section 812 (e) of the Internal Revenue Code of 1939.

STATUTES AND OTHER AUTHORITIES INVOLVED

The pertinent provisions of Section 812(e) of the Internal Revenue Code of 1939, Section 81.47b of Treasury Regulations 105, and Revenue Ruling 56-26, 1956-1 Cum. Bull. 447, are set forth in the Appendix, *infra*, pp. 9-15.

STATEMENT

The undisputed facts may be summarized as follows:

The decedent died testate on August 6, 1954, a resident of California. He was survived by his wife, Helen, and his son, William. The decedent's will and codicils were duly probated, and the petitioner, the Bank of America, National Trust & Savings Association, was appointed executor of the estate. (R. 13-14, 25; Pet. 2-3.)

Pursuant to orders of the probate court, the executor paid to the widow, during the period of the probate proceedings, a monthly allowance for maintenance which totaled $10,500 (R. 14, 19-21, 25-26; Pet. 3).

The decedent's will, after making some small specific bequests, gave forty per cent of his residuary

estate to his widow and sixty per cent to his son. In the estate tax return, the executor deducted the total sum of $10,500 from the value of the gross estate, as part of the marital deduction. The Commissioner disallowed sixty per cent of that amount, and increased the estate tax accordingly (R. 9–10, 14–16, 26; Pet. 3). The Tax Court upheld the Commissioner (R. 33; Pet. 4), and the Court of Appeals unanimously affirmed (R. 51; Pet. 5).

ARGUMENT.

Section 812(e) of the Internal Revenue Code of 1939 (App. *infra*, pp. 9–10) provides for a marital deduction from the value of the gross estate of an amount equal to the value of any interest in property which passes or has passed from the decedent to the surviving spouse, but only to the extent that such interest is included in determining the value of the gross estate. Section 812(e)(1)(B) provides, however, that no marital deduction shall be allowed (1) if the interest passing to the surviving spouse will terminate or fail upon the occurrence or non-occurrence of any event or contingency, or upon the lapse of time, and (2) if any interest in the property passes or has passed from the decedent to some other person who may possess or enjoy any part of the property upon termination or failure of the surviving spouse's interest. *See Meyer* v. *United States*, No. 13, this Term, decided November 21, 1960. The question in this case is whether sixty per cent of the widow's allowance was properly excluded from the

marital deduction on the ground that it came within the foregoing limitation.

Both courts below held (R. 32–33; Pet. 7a–8a), and petitioner does not deny, that under California law the widow had only a contingent interest in sixty percent of the allowance when awarded by the probate court, since that proportion was subject to termination upon her death or remarriage during the probate proceedings. California Probate Code, Secs. 680–682 (53 West's Ann. California Codes, 1956); *Estate of Blair*, 42 Cal. 2d 728, 269 P. 2d 612; *Estate of Hamilton*, 66 Cal. 576, 6 Pac. 493. Petitioner contends (Pet. 4), however, that the entire widow's allowance should have been included in the marital deduction, on the theory that "only the surviving widow had an interest in the maintenance allowance granted her by the probate court, that such maintenance allowance was the 'property' as that term is used in Section 812(e) of the 1939 Code, that no interest in such property passed to a person other than the widow and no such other person could possess or enjoy any part of such property, and that, accordingly, the maintenance allowance was not a nondeductible terminable interest."

We submit that both courts below properly rejected this strained interpretation of Section 812(e). As the court of appeals correctly held (Pet. 6a–7a), the right to receive a widow's allowance during the time necessary to complete the administration of the estate is "an 'interest' in 'property' represented by the estate assets, and not 'property' itself.

at the date of the testator's death." "The term 'property' used in section 812(e), as applied to a widow's allowance in California refers to the assets of the estate and not to the right to receive the allowance" (Pet. 8a).

The basic flaw in petitioner's argument is its failure to recognize and apply the settled principle that the right to a marital deduction must be determined on the basis of the situation as it existed at the time of the decedent's death and not on the basis of what the surviving spouse actually received. *Shedd's Estate* v. *Commissioner*, 237 F. 2d 345 (C.A. 9), certiorari denied, 352 U.S. 1024; *Kasper* v. *Kellar*, 217 F. 2d 744 (C.A. 8); cf. *Meyer* v. *United States*, No. 13, this Term, decided November 21, 1960; *Ithaca Trust Co.* v. *United States*, 279 U.S. 151. Under California law, the widow received a forty-percent vested interest in the decedent's residuary estate, and that percentage of the allowance would have gone to her or to her estate even if no support allowance had been granted, and whether or not she died or remarried during the probate period. However, the sixty-percent balance would have gone to the son under the will, if it had not been paid to the widow. As to this proportion of the allowance, therefore, the son had an interest in the property (the assets of the decedent's estate) which he would have received if the widow had died or remarried prior to the time the full allowance had been paid her. Accordingly, the sixty percent of the widow's allowance was properly disallowed as a marital deduction, since it was a terminable interest and

not a vested right of property which, in the event of her death or remarriage immediately following the decedent's death, would have been an asset of her estate. Rev. Rul. 83, 1953–1 Cum. Bull. 395; Rev. Rul. 56–26, 1956–1 Cum. Bull. 447 (Appendix, *infra*, pp. 13–15).

Petitioner contends (Pet. 5) that the decision below is in conflict with *Quivey* v. *United States*, 176 F. Supp. 433 (D. Neb.), and *Shafer* v. *United States*, C. C. H. Fed. Est. and Gift Tax Rep., par. 11949 (S.D. Iowa), in which marital deductions were permitted for widow's allowances. Both of those cases, however, are now on appeal to the Court of Appeals for the Eighth Circuit, and there is accordingly no conflict among circuits on this question. Petitioner also stresses (Pet. 7) a statement in the Senate and House Committee Reports on the Revenue Act of 1950 that, as a result of an amendment to Section 812 there made, "such amounts heretofore deductible under section 812(b) will be allowable as a marital deduction subject to the conditions and limitations of section 812(e)."[1] But this statement shows on its face that Congress was not thereby attempting to grant all widow's allowances a marital deduction, but only those which met "the conditions and limitations of section 812(e)." And, as we have shown, sixty percent of the

[1] Prior to the 1950 Act, Section 812(b) of the 1939 Code permitted the deduction from the gross estate of widows' allowances to the extent "reasonably required and actually expended for the support during the settlement of the estate of those dependent upon the decedent." The provision for the marital deduction was added to the Code by Section 361 of the Revenue Act of 1948, c. 168, 62 Stat. 110.

widow's allowance here did not meet those conditions and limitations. If petitioner's views were correct, all widow's allowances that are actually paid would qualify for the marital deduction. Congress, however, has refused to permit such a broad deduction, and instead has limited it to cases where the allowance satisfies the strict standards of Section 812(e). See, for example, S. Rep. No. 1622, 83d Cong., 2d Sess., p. 125.

The decision below does not hold, as petitioner urges (Pet. 9), that only lump-sum allowances, but not those payable in installments, could qualify for the marital deduction. For the test is whether under the applicable law the widow's right vested indefeasibly in her at the time of the decedent's death; and, if it did, it makes no difference whether the allowance is payable in a lump sum or in installments. Rev. Rul. 83, 1953–1 Cum. Bull. 395; Rev. Rul. 56–26, 1956–1 Cum. Bull. 447 (Appendix, *infra*, pp. 13–15). Nor is there any basis for petitioner's suggestion (Pet. 7) that the court below may have held that widow's allowances are not interests passing to the surviving spouse within the meaning of the marital-deduction provision, and therefore that no such allowance can ever qualify for the marital deduction. The court below held (Pet. 10a) only "that the right to a widow's allowance in California is a terminable interest in the estate assets; that in the instant case another interest in said assets passed from the decedent to his son for less than an adequate consideration; and that the son is entitled

to possess and enjoy a portion of said assets upon the termination of the widow's right to an allowance."

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

J. LEE RANKIN,
Solicitor General.

CHARLES K. RICE,
Assistant Attorney General.

ROBERT N. ANDERSON,
L. W. POST,
Attorneys.

DECEMBER 1960.

APPENDIX

Internal Revenue Code of 1939:

SEC. 812. NET ESTATE.

For the purpose of the tax the value of the net estate shall be determined, in the case of a citizen or resident of the United States by deducting from the value of the gross estate—

* * * * *

(e) [as added by Sec. 361(a), Revenue Act of 1948, c. 168, 62 Stat. 110] *Bequests, Etc., to Surviving Spouse.*—

(1) *Allowance of Marital Deduction.*—

(A) *In General.*—An amount equal to the value of any interest in property which passes or has passed from the decedent to his surviving spouse, but only to the extent that such interest is included in determining the value of the gross estate.

(B) *Life Estate or Other Terminable Interest.*—Where, upon the lapse of time, upon the occurrence of an event or contingency, or upon the failure of an event or contingency to occur, such interest passing to the surviving spouse will terminate or fail, no deduction shall be allowed with respect to such interest—

(i) if an interest in such property passes or has passed (for less than an adequate and full consideration in money or money's worth) from the decedent to any person other than such surviving spouse (or the estate of such spouse); and

(ii) if by reason of such passing such person (or his heirs or assigns) may possess or enjoy any part of such property after such termination or failure of the interest so passing to the surviving spouse;

and no deduction shall be allowed with respect to such interest (even if such deduction is not disallowed under clauses (i) and (ii)—

(iii) if such interest is to be acquired for the surviving spouse, pursuant to directions of the decedent, by his executor or by the trustee of a trust.

For the purposes of this subparagraph, an interest shall not be considered as an interest which will terminate or fail merely because it is the ownership of a bond, note, or similar contractual obligation, the discharge of which would not have the effect of an annuity for life or for a term.

* * * * *

(D) *Interest of Spouse Conditional on Survival for Limited Period.*—For the purposes of subparagraph (B) an interest passing to the surviving spouse shall not be considered as an interest which will terminate or fail upon the death of such spouse if—

(i) such death will cause a termination or failure of such interest only if it occurs within a period not exceeding six months after the decedent's death, or only if it occurs as a result of a common disaster resulting in the death of the decedent and the surviving spouse, or only if it occurs in the case of either such event; and

(ii) such termination or failure does not in fact occur.

* * * * *

(26 U.S.C. 1952 ed., Sec. 812.)

Treasury Regulations 105, promulgated under the Internal Revenue Code of 1939:

SEC. 81.47b [as added by T.D. 5699, 1949-1 Cum. Bull. 181]. *Nondeductible Interests.*—(a) *General.*—The property interests which passed from the decedent to his surviving spouse (as set forth in section 81.47a) fall within two general categories: (1) those with respect to which

the marital deduction is authorized, and (2) those with respect to which the marital deduction is not authorized. Such categories are hereinafter referred to as "deductible interests" and "nondeductible interests," respectively. As to the several classes of "nondeductible interests," see paragraphs (b) to (f), inclusive, of this section. Subject to the limitation set forth in section 81.47d, the marital deduction is equal in amount to the aggregate value of the "deductible interests," that is, the property interests which passed from the decedent to his surviving spouse and do not fall within any of the classes described in such paragraphs (b) to (f).

* * * * *

(d) *Interest in property which another person may possess or enjoy.*—Section 812(e)(1)(B) provides that no marital deduction shall be allowed with respect to certain property interests (referred to generally as "terminable interests") which passed from the decedent to his surviving spouse, in case—

(1) An interest in the same property passed at any time (for less than an adequate and full consideration in money or money's worth) from the decedent to any person other than such spouse (or the estate of such spouse), and

(2) By reason thereof, such person (or his heirs or assigns) may possess or enjoy any part of such property after the termination or failure of the interest therein which passed from the decedent to his surviving spouse.

The foregoing provision is applicable only where interests in the same property passed from the decedent both to his surviving spouse, and to some other person (for less than an adequate and full consideration in money or money's worth), and is applicable irrespective of whether both such interests passed from the decedent at the same time or under the same

instrument. Under such circumstances, if the other person to whom an interest passed may, by reason thereof, possess or enjoy any part of the property after the termination or failure of the interest therein which passed from the decedent to his surviving spouse, the latter interest is a "nondeductible interest." As to the meaning of the term "passed from the decedent to a person other than his surviving spouse," see paragraph (b) of section 81.47a.

In determining whether an interest in the same property passed from the decedent both to his surviving spouse and to some other person, a distinction is to be drawn between "property," as such term is used in section 812(e), and an "interest in property." The term "property" refers to the underlying property in which various interests exist; each such interest is not for this purpose to be considered as "property."

Interests which passed to a person other than the surviving spouse include interests so passing under the decedent's exercise, release, or nonexercise of a nontaxable power to appoint. It is immaterial whether the property interest which passed from the decedent to a person other than his surviving spouse is included in the decedent's gross estate.

The term "person other than his surviving spouse" includes the possible unascertained takers of a property interest, as, for example, the members of a class to be ascertained in the future. As another example, assume that the decedent created a power of appointment over a property interest, which does not come within the purview of paragraph (c) or (d) of section 81.47a. In such a case, the term "person other than his surviving spouse" refers to the possible appointees and possible takers in default (other than the spouse) of such property interest. Whether there is a possibility that the

"person other than his surviving spouse" (or the heirs or assigns of such person) may possess or enjoy the property following termination or failure of the interest therein which passed from the decedent to his surviving spouse is to be determined as of the time of the decedent's death.

* * * * *

Rev. Rul. 56-26, 1956-1 Cum. Bull. 447:

* * * * *

Advice has been requested whether amounts paid to a surviving widow as an allowance for support will qualify for the marital deduction authorized by section 2056 of the Internal Revenue Code of 1954 under the circumstances set forth below.

The decedent died testate leaving his entire probate estate to his surviving wife. Pursuant to an order of the local probate court, the widow was entitled to an allowance for support during the period of settlement of the deceased spouse's estate.

Revenue Ruling 83, C.B. 1953-1, 395, sets forth the general rule to be followed in such cases. Such rule is to the effect that, in order to qualify for the marital deduction, a property interest in the form of an allowance made, pursuant to local law, for the support of the decedent's spouse, must be a vested right of property, such as will, in the event of the spouse's death as of any moment or time following the decedent's death, survive as an asset of her estate. Otherwise, such allowance constitutes a terminable interest within the meaning of section 2056(b) of the 1954 Code and, as such, does not qualify for the deduction.

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[2] Rev. Rul. 56-26 refers specifically to Section 2056(b) of the Internal Revenue Code of 1954, but this does not differ from Section 812(e)(1)(B) of the 1939 Code, with which we are here concerned, in any material respect. Hence the ruling is applicable here.

The terminable interest rule of section 2056(b) does not apply, however, unless (1) an interest in the property also passed from the decedent (whether by will or under local law) to someone other than his surviving spouse, *or the estate of such spouse*, and (2) by reason of such passing such other person may possess or enjoy such property after the termination or failure of the interest therein which passed to the surviving spouse. Thus, assume a case where a decedent leaves property to his widow for life, with remainder to her estate (executors or administrators). The life estate given is clearly a terminable interest, but as no interest in the property passed to anyone other than the widow, or the estate of the widow, the rule set forth in section 2056(b) does not apply and the entire interest qualifies for the marital deduction.

The same would apply in respect of the interest of the instant decedent's widow in the form of her support allowance. Since the decedent left her his entire probate estate, no interest in the amounts awarded for her support during the settlement of the estate may, for the purposes of section 2056, be considered as having passed to any person other than his spouse, or the estate of such spouse. In other words, while the widow's death at any time following the decedent's death would have terminated her right to any further support allowance, any amounts remaining unpaid would, nevertheless, become a part of the residuary estate and, as such, would pass to her estate under the terms of her husband's will. Thus, the requirement of section 2056 of the statute, as more particularly set forth in Revenue Ruling 86, *supra*, has been met, and the marital deduction is allowable.

So long as the interest passing to the surviving spouse, when viewed as of the decedent's

death, is an indefeasibly vested interest, it is immaterial whether the statutory requirement in the foregoing respect is satisfied by reason of the applicable provisions of the local law, by reason of the terms of the decedent's will, or otherwise. Therefore, the same rules would apply in the case of an intestate share in the decedent's estate. For example, if the decedent died intestate and one-third of his estate passed to his surviving spouse as absolute owner under the intestacy laws of the jurisdiction, then one-third of any amounts paid out of the estate, pursuant to local law, for the support of such spouse, is a deductible interest since, to that extent, it in effect merely represents an advancement from property which is already indefeasibly hers and will pass to her, or to her estate, in any event.

In view of the foregoing, it is held that while amounts allowed for the support of the surviving spouse during the period of settlement of the deceased spouse's estate may otherwise constitute a nondeductible interest under section 2056(b) of the Internal Revenue Code of 1954, such amounts may nevertheless qualify for the estate tax marital deduction to the extent that all or any part of the residuary estate of the decedent passed from the decedent to his surviving spouse by intestacy or as beneficiary under his will.